UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WAL-MART STORES, INC.

and **Case 13–CA–114222**

THE ORGANIZATION UNITED FOR RESPECT AT WALMART (OUR WALMART)

Vivian Perez Robles, Esq.,
for the General Counsel.
Lawrence Katz and *Erin Bass, Esqs.*,
for the Respondent.
Joey Hipolito, Esq.,
for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the parties contest whether Walmart Stores, Inc. (Walmart or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining dress codes that state, in pertinent part:

> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, pants, skirts, hats, jackets or coats are also permitted[.]

The General Counsel asserts that the dress code language is unlawfully overly broad because the language that permits logos only if they are "small" and "non-distracting" violates Walmart associates' right to wear union insignia in the workplace. Walmart, meanwhile, asserts that its policy on logos is justified by special circumstances – specifically, Walmart's need to ensure that associates' name tags are visible to customers and other associates, and Walmart's need to avoid distractions that would detract from the customer experience. As set forth more fully below, I find that Walmart's dress code language regarding logos violates Section 8(a)(1) of the Act because it is overly broad, is not justified by special circumstances, and places unlawful restrictions on associates' Section 7 right to wear union insignia.

STATEMENT OF THE CASE

The Organization United for Respect at Walmart (OUR Walmart or Charging Party) filed the charge underlying this case on September 26, 2013, and the General Counsel issued a consolidated complaint on October 20, 2014 (covering this case and Case 13–CA–110452). The General Counsel amended the consolidated complaint on March 17, 2015. Respondent filed timely answers denying the alleged violations in the consolidated complaint.

On April 14, 2015, I accepted a settlement between Walmart and OUR Walmart that resolved the allegation in Case 13–CA–110452 (subject to compliance with the settlement agreement). That same day, I severed this case (Case 13–CA–114222) from the consolidated complaint, and this case proceeded to trial on April 23, 2015, in Chicago, Illinois.

Notably, this is not the first time that the parties have litigated the lawfulness of Walmart's dress code language concerning logos. Indeed, in September 2014, the parties litigated the lawfulness of virtually identical dress code language in Case 32–CA–090116 et al., albeit with a different evidentiary record and concerning a dress code that only applied in California. Although I found the dress code at issue in Case 32–CA–090116 to be facially unlawful (see *Walmart Stores, Inc.*, 32–CA–090116 (December 9, 2014), slip op. at 29–30), I considered the merits of this case independently and based on the evidentiary record that the parties presented at trial on April 23, 2015.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, OUR Walmart and Respondent, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Bentonville, Arkansas, as well as various stores throughout the United States (including Chicago, Illinois), engages in the retail sale and distribution of consumer goods, groceries and related products and services. In the twelve-month period ending December 31, 2013, Respondent derived gross revenues in excess of $500,000. During the same time period, Respondent purchased and received products, goods and materials at its Chicago, Illinois facility that were valued in excess of $5,000 and came directly from points outside of the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Walmart's Dress Code Language on Logos

In February 2013, Walmart adopted a revised dress code for all hourly associates in its stores in all states (except for seven states that had state-specific policies).[3] Under that dress

[1] The transcripts in this case generally are accurate, but I hereby make the following correction to the record: Page 33, line 18: "subject of" should be "subjective."

[2] Although I have included several citations in the findings of fact to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

[3] The following geographic areas had "state-specific" dress code policies and thus were not covered by any of the February 2013 and May 2014 dress codes in the record: Arizona; California; Louisiana; Massachusetts; Mississippi; Missouri; and New Jersey. (Jt. Exhs. 1–9 (p. 1); 13). The District of Columbia was covered by certain versions of the February 2013 and May 2014 dress code, but was not

code, associates who are working (i.e., not on a rest or meal break) must wear a Walmart nametag that is either clipped to the associate's shirt or attached to a break-away lanyard. For the most part, Walmart associates also must wear a dark blue shirt and a pair of brown khaki pants (the shade of each clothing item may vary, and associates are responsible for purchasing these items). (Jt. Exh. 1, pp. 1–2; Tr. 71–72, 79, 91, 161, 182, 211, 231, 241). The dress code sets forth the following guidelines regarding logos on clothing:

> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, pants, skirts, hats, jackets or coats are also permitted.[4]

(Jt. Exh. 1, p. 2).[5] Although Walmart updated its dress code in May 2014, Walmart kept the same language regarding clothing logos that was in its February 2013 dress code. (See Jt. Exh. 9, p. 2).

In September 2014, Walmart modified its dress code language about clothing logos to state as follows:

> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, pants, skirts, capris, skorts, dresses, hats, jackets or coats are also permitted if they are no larger than the size of your associate name badge[.]

(Jt. Exh. 10–11, p. 2) Walmart also announced in the September 2014 dress code that all associates would be required to wear a company-issued a sleeveless Walmart blue vest with a Walmart "spark" logo on the back. Walmart resumed using vests (it had last done so in 2007) because it intended for the vests to serve as another means for customers and coworkers to identify Walmart associates. (Jt. Exhs. 10–11, p. 2; Tr. 71, 86–88, 90–91, 106–107, 191–192).

B. Walmart's Rationale and Parameters for its Dress Code Language about Logos

In the interest of ensuring that customers, coworkers and loss prevention personnel can easily identify Walmart associates, Walmart requires its associates to wear nametags while on duty, and requires that any non-Walmart logos be "small" and "non-distracting." (Tr. 70, 79–80, 94–95, 104, 161–162, 165–166, 178, 192). Walmart defines "small" logos as any logos that are not larger than the Walmart nametag, which is a 2.25–inch long by 3.5–inch wide plastic card with room for the associate's first name.[6] (R. Exhs. 2, 2(a) (showing a blue and white nametag,

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covered by other versions. (Compare Jt. Exhs. 1–3 (District of Columbia covered by dress code) with Jt. Exhs. 4–9 (District of Columbia not covered by dress code because it has its own policy)). The September 2014 dress code (discussed infra), meanwhile, covered all "states" except for the District of Columbia and New York, which had "state-specific" policies. (Jt. Exhs. 10–11 (p. 1)).

[4] The dress code also states that "[t]he logo or graphic must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional messaging." (Jt. Exh. 1 (p. 2)). The General Counsel does not take issue with that portion of the dress code in this case. (Tr. 30–31.)

[5] The record includes multiple versions of the February 2013 dress code that reflect modifications that are not material to the issues in this case. Each of those versions of the dress code contains the same language regarding logos. (See Jt. Exhs. 1–8.)

[6] Walmart associates also wear a "badge backer" card that is pinned beneath the nametag and shows

as well as a yellow badge backer); Tr. 65–68, 198, 207, 231, 241–242; see also Jt. Exhs. 10–11, p. 2 (September 2014 dress code, stating explicitly that logos must not be larger than the Walmart nametag)).

There is no evidence that Walmart has an established definition for what logos qualify as "non-distracting." Walmart does have general goals of providing great customer service and keeping its customers focused on shopping, but when questions have arisen about whether an associate's appearance or attire is distracting to the customer experience, Walmart managers have handled those questions on an ad-hoc basis (with the assistance of Walmart's labor relations department if requested). (Tr. 51–53, 94, 98–100).

Walmart expects its associates to comply with the nametag and dress code logo requirements at all times when they are on duty, even at times when the associate is not in contact with customers because the associate is working in a non-public area of the store or is working while the store is closed to the public.[7] (Tr. 78, 80, 95, 113–114, 190–191, 221, 237–238, 252; see also Tr. 102–104 (noting that Walmart has approximately 4,500 "supercenters" and "discount stores," and that approximately 2,900 of those stores are open 24 hours); 216, 225, 249 (providing examples of stores that close at or after 10 p.m. and reopen at 6 or 7 a.m.)). Walmart applies its dress code to associates who are assigned to work in non-public areas of the store because those associates periodically may be required to go to the sales floor as part of their job duties, and may interact with customers at those times. (Tr. 167–171, 195–197, 205–208, 214–216, 229–231, 248–249). As for associates who work overnight shifts that span times when the store is closed to the public, Walmart applies its dress code to those associates because they may interact with customers during the portions of their shift when the store is open, and because the dress code and nametag requirement assists managers in identifying associates at all times, including when the store is closed. (Tr. 217–218, 226–227, 249–250).

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the associate's job title. The portion of the badge backer that is visible beneath the nametag is 1.25–inches long and 2.75–inches wide. (R. Exhs. 2, 2(a); Tr. 65–68). There is no evidence that Walmart uses the badge backer, or the portion of the badge backer that is visible when worn under the nametag, to assess whether logos are "small" enough to comply with the dress code. (See Tr. 66 (distinguishing between Walmart nametags and badge backers); Tr. 207, 231, 241–242 (explaining that logos must be smaller than the Walmart nametag)).

[7] Consistent with its requirement that associates comply with the dress code whenever they are on duty, Walmart does not allow its associates to don or doff clothing or other items with logos when moving between public and non-public areas of the store, or when the store opens or closes its doors to the public. Although some of Walmart's witnesses testified that it would not be possible for associates to don or doff items (such as buttons, clothing or other items with union insignia) while on duty because of time constraints (see Tr. 220, 228–229, 250–251), I have given that testimony little weight because the witnesses made no distinction between items that could easily be removed (such as a hat or other item worn on the surface of other clothing), and items that might require more privacy (and thus more time) to remove. See *Casa San Miguel*, 320 NLRB 534, 540 (1995) (distinguishing between union insignia that an employee printed on her uniform, which made it impractical to remove when going between nonpatient and patient care areas of the hospital, and other items that, for example, an employee might attach to his or her uniform and be able to remove).

C. Examples of how Walmart has Interpreted and Applied its Dress Code to Logos

To illustrate how it has interpreted its dress code to permit "small" and "non-distracting" logos and prohibit logos that do not comply with those limitations, Walmart provided examples of how it has applied its dress code to various logos since February 2013.

Examples of logos that Walmart has permitted

- OUR Walmart buttons, pins and wristbands that are smaller than the Walmart nametag (Tr. 75–77, 242, 244–245, 247–248; R. Exh. 1 (pp. 2708–2709, 2879–2880, 2928–2930, 3093–3094, 3161, 3808, 3900, 4021–4022); see also id. (April 16, 2015 transcript, pp. 16–19, 54);

- A 1.5–inch diameter green button with the following wording: "Colossians 4:1 'Masters, provide your slaves with what is right and fair, because you know that you also have a Master in heaven." (R. Exh. 3; Tr. 61–64 (noting that OUR Walmart supporters were wearing the button));

- A 2–inch by 2–inch photograph that associates wore in remembrance of an associate who was killed in an automobile accident (Tr. 198–204, 206–207 (noting that this smaller photograph replaced a larger one that did not comply with the dress code logo size restrictions)); and

- Assorted pins and buttons (e.g., buttons with family photographs, smiley faces or the Easter bunny) that were smaller than the Walmart nametag (Tr. 231–232, 242).

Examples of logos that Walmart has determined violate its dress code

- A 3–inch by 5–inch photograph that associates wore in remembrance of an associate who was killed in an automobile accident (Tr. 198–204, 206–207 (noting that Walmart deemed this photograph of the deceased associate to be too large and thus potentially distracting for customers, and allowed associates to replace it with the smaller 2–inch by 2–inch version described above));

- A handwritten message on an associate's knuckles and palms that stated "Stop, don't shoot," where the message was the same width as the Walmart nametag (Tr. 212–214, 222 (noting that Walmart deemed the message to be too distracting for customers));

- A 3–inch by 5–inch piece of paper (the back of a store receipt) on which an associate drew a hammer and sickle and wrote "Comrade [name]. How may the Communist Party help you?" (R. Exh. 7; Tr. 232–237 (noting that Walmart determined that the note violated the dress code because it was both too large and distracting));

- An 8.5–inch by 11–inch piece of paper with a drawing of a cat roasting a marshmallow, worn by an associate underneath his nametag (Tr. 183–185 (noting that Walmart

determined this drawing/logo violated the dress code because it was too large); see also R. Exh. 6); and

- A 3.5–inch diameter OUR Walmart button (Tr. 243–244 (noting that Walmart determined that the button violated the dress code because it was too large); R. Exh. 8).

III. ADMISSIBILITY OF WALMART'S PROFFERED EXPERT TESTIMONY

During trial, Walmart called Dwight Hill to testify as an expert witness. Over the General Counsel's objection concerning whether Mr. Hill qualified as an expert witness under Federal Rule of Evidence 702 (FRE 702), I permitted Mr. Hill to testify and accepted his report into the record, but I did so only provisionally, subject to any arguments that the parties might make in their posttrial briefs concerning Mr. Hill's qualifications as an expert and the admissibility of his testimony and report. (Tr. 134–135). Now that the parties have briefed the issue, I return to the question of whether Mr. Hill's testimony and report are admissible under FRE 702.

Under FRE 702, "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. Rule of Evidence 702; see also *Fluor Daniel, Inc.*, 350 NLRB 702, 713 (2007). "Whether to permit expert testimony is a question that is committed to the discretion of the trial judge." *California Gas Transport*, 355 NLRB 465, 465 fn.1 (2010).

Based on Mr. Hill's extensive experience as a retailer and as a consultant to retailers, I find that he is qualified as an expert witness in the areas of retail strategy and the customer experience. (See R. Exh. 5 and Tr. 117–128 (indicating that Mr. Hill has over 25 years of experience with merchandise planning, customer strategy, enterprise cost reduction, workforce management and other areas)). However, I also find that Mr. Hill's testimony and report should be excluded under FRE 702 because the specialized knowledge that he offered does not assist me, as the trier of fact, with understanding the evidence or determining any facts in issue in this case. In essence, Mr. Hill asserted in his testimony and report that retailers seek to minimize customer distractions and keep their customers focused on shopping, and hopefully, buying. In connection with that goal, retailers have their employees follow dress codes and wear name tags to: make the employees easily identifiable to customers who need assistance (as well as to coworkers and loss prevention personnel); and avoid inciting conversations between customers and employees that are not relevant to the customer's shopping activities. (R. Exh. 5; Tr. 135–147.) None of those points are so complex that they require explanation by an expert witness; indeed, Walmart's managerial witnesses made the same points effectively in their own testimony (a fact that also makes Mr. Hill's testimony and report cumulative and therefore inadmissible). (See, e.g. Tr. 70–73, 79–80, 85–96, 160–161, 165–166 (testimony of: senior director of labor relations Jaime Durand; director of human resources support LaTonia George; and market asset protection manager Tina Longfellow); see also Findings of Fact (FOF), Sections II(B)–(C), supra)). Accordingly, I hereby reclassify Mr. Hill's testimony as an offer of proof and reclassify

Mr. Hill's report (R. Exh. 4) as a rejected exhibit, and I will disregard both in my substantive analysis.

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 13–14 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 14. To the extent that I have made them (since most of the facts in this case are undisputed), my credibility findings are set forth above in the findings of fact for this decision.

B. Is Walmart's Dress Code Language Regarding Logos Facially Unlawful?

1. Complaint allegation and applicable legal standard

The General Counsel alleges that since at least May 2013, Walmart has violated Section 8(a)(1) of the Act by maintaining the following rule in its dress code guidelines in all states except those with state-specific policies: "Wal-Mart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, hats, jackets or coats are also permitted, subject to the following . . ." (GC Exh. 1(e), par. V(a)).

As the Board reiterated in a recent decision, it is well settled that an employer violates Section 8(a)(1) when it prohibits employees from wearing union insignia at the workplace, absent special circumstances. *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015). The Board has found special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees. However, a rule that curtails employees' Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances. Id.; see also *Stabilus, Inc.*, 355 NLRB 866, 868 (2010); *W San Diego*, 348 NLRB 372, 373 (2006); *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982) (noting that customer exposure to union insignia, standing alone, is not a special circumstance that permits an employer to prohibit employees from displaying union insignia).

In its posttrial brief, Walmart argued that I should apply a hybrid legal standard that combines the legal standard that the Board applies when considering work rules (see Lutheran

Heritage Village-Livonia, 343 NLRB 646, 646–647 (2004)) with the legal standard that the Board applies when considering restrictions on employees' Section 7 right to wear union insignia (see *Boch Honda*, supra). See Walmart Posttrial Br. at 4 (relying on the D.C Circuit's decision in *World Color (U.S.A.) Corp. v. NLRB*, 776 F.3d 17, 20 (D.C. Cir. 2015) as the basis for its proposed hybrid legal standard); *Lutheran Heritage Village-Livonia*, 343 NLRB at 646–647 (explaining that for work rules, the analysis begins with whether the rule is unlawful because it explicitly restricts activities protected by Section 7, and, if necessary then turns to the question of whether the work rule is unlawful because employees would reasonably construe the language to prohibit Section 7 activity, the rule was promulgated in response to union activity, or the rule has been applied to restrict the exercise of Section 7 rights).

There is no support in Board law for Walmart's proposed hybrid standard. To the extent that the D.C. Circuit applied a hybrid standard when analyzing questions about union insignia in *World Color*, I respectfully submit that the D.C. Circuit did so in error. Compare *World Color (U.S.A.) Corp. v. NLRB*, 776 F.3d at 19–20 (recognizing that employees have a Section 7 right to wear union insignia unless special circumstances are present, but then analyzing the case using the *Lutheran Heritage* legal standard for work rules) with *Guard Publishing Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009) (explaining that "[w]hen [an employer] bans the wearing of union insignia, the employer bears the burden of overcoming the presumption of an unfair labor practice by demonstrating that special circumstances exist"). In any event, since I am bound to follow Board precedent, I will apply the legal standard that the Board reiterated in *Boch Honda* concerning employees' Section 7 right to wear union insignia.

2. Analysis

As its initial argument, Walmart asserts that the Act should allow employers (and particularly retailers) to set forth some reasonable limits on union insignia to avoid disruption in the work and shopping environment.[8] (See Walmart Posttrial Br. at 4–9). It suffices to observe, in response, that the Board already recognizes the employer's interests in the existing legal standard that applies to union insignia – that is, the Board recognizes that while employees have a Section 7 right to wear union insignia, employers may restrict that right if the restrictions are justified by special circumstances.

Turning, then, to the question of whether Walmart's dress codes are unlawful, the evidentiary record establishes that, since February 2013, Walmart has maintained dress code language that prohibits associates from wearing logos, including union insignia, that are "distracting" and/or are larger than Walmart's 2.25–inch by 3.5–inch nametag. (FOF, Section II(A)–(B); see also FOF, Section II(C) (indicating that Walmart permits "non-distracting" union insignia that are smaller than the Walmart nametag). Since Walmart's dress code imposes limits on its associates' Section 7 right to wear union insignia, the dress code is overly broad and is

[8] In connection with its initial argument, Walmart maintains that the Act does not require retailers to tolerate large, distracting and/or absurd union insignia. That argument, however, mischaracterizes the positions of the General Counsel and Charging Party, who merely maintain that Walmart's February 2013, May 2014 and September 2014 dress code restrictions on logos are unlawfully overly broad. If the General Counsel and Charging Party prevail on that point, such a result does not mean that anything goes when it comes to union insignia. To the contrary, Walmart would remain free to craft a revised dress code that addresses its concerns and complies with the Act.

unlawful unless the dress code language concerning logos is justified by special circumstances. See *Boch Honda*, 362 NLRB No. 83, slip op. at 2.

In this case, Walmart asserts that its dress code language about logos meets the special circumstances requirement because Walmart has an interest in ensuring: that its associates can easily be identified through their nametags by customers, coworkers and loss prevention personnel; and that noncompliant logos do not distract the customer from his or her shopping experience. (See Walmart Posttrial Br. at 9; FOF, Section II(B)).

Viewing the evidence as a whole, I find that Walmart failed to show that the limitations that it places on logos (including union insignia) are justified by special circumstances. First, Walmart did not show that its concerns about logos impacting nametag visibility and the customer experience constitute special circumstances. Specifically, Walmart did not present any evidence of a significant or widespread problem with associates wearing union insignia or other logos that actually made it difficult or impossible for others to see their Walmart nametags.[9] Nor did Walmart present evidence of a significant or widespread problem with customers being distracted by logos worn by associates. Given the lack of such evidence, much less evidence that would justify the limitations on union insignia based on special circumstances that the Board has recognized in other cases (e.g., the need to protect employee safety, avoid damage to machinery or products, avoid exacerbating employee dissension, or protect a public image that the employer established as part of its business plan),[10] Walmart's concerns about nametag visibility and the customer experience fall flat. See *Malta Construction Co.*, 276 NLRB 1494, 1495 (1985) (rejecting a special circumstances defense because the employer failed to prove that allowing union insignia on its orange hardhats would make it difficult for the employer to identify its employees), enfd. 806 F.2d 1009 (11th Cir. 1986); *Nordstrom, Inc.*, 264 NLRB at 701–702 (noting that customer exposure to union insignia, standing alone, is not a special circumstance that permits an employer to prohibit employees from displaying union insignia); compare *Albis Plastics*, 335 NLRB 923, 923–925 (2001) (employer's prohibition of union stickers on hardhats was permissible because the employer demonstrated that the limitation was justified by special circumstances in the form of a legitimate strategy to promote plant safety), enfd. 67 Fed. Appx. 253 (5th Cir. 2003).

Second, even if one assumes, arguendo, that Walmart has valid concerns about logos affecting nametag visibility and the customer experience that could constitute special circumstances, Walmart's dress code language regarding logos is not narrowly tailored to those concerns. For example, Walmart requires all union insignia to be smaller than or equal to the size of Walmart's 2.25–inch by 3.5–inch nametag, irrespective of the content or nature of the insignia. By imposing such a strict size limitation on union insignia, Walmart runs afoul of multiple Board cases in which the Board has upheld the right of employees to wear union insignia of a variety of types and sizes, including insignia sizes much larger than Walmart's

[9] As an aside on this point, I note that it is not hard to envision a wide variety of union insignia that associates could wear that would be larger than their Walmart nametag, but yet pose little or no risk of obscuring or distracting attention from their Walmart nametags (union insignia on hats, arm bands, leg bands, shirt sleeves, and medium-sized buttons come to mind, among other possibilities).

[10] In its posttrial brief, Walmart explicitly stated that it "does not contend that its rule regarding logos and graphics is justified by 'public image' as defined in Board law." (Walmart Posttrial Br. at 11 fn.4).

nametags.[11] See, e.g., *A T & T Connecticut*, 356 NLRB No. 118, slip op. at 1 (2011) (finding that the employer violated the Act when, in the absence of special circumstances justifying the limitation, the employer prohibited its technicians from wearing white T-shirts with the words "Inmate #" written on the front in "relatively small print," and with two vertical stripes and the words "Prisoner of A T $ T" on the back); *United Rentals*, 349 NLRB 853, 853 fn. 2, 860–861 (2007) (finding that a dress code was unlawful because it prohibited employees from wearing hats, shirts, sweatshirts and jackets with the union's logo); *Northeast Industrial Service Co.*, 320 NLRB 977, 979–980 (1996) (same, regarding a dress code rule that prohibited union hardhat stickers that were 3 inches in diameter); *Serv-Air, Inc.*, 161 NLRB 382, 401–402, 416–417 (1966) (same, regarding an employer that prohibited various union insignia, including an improvised, crudely printed, paper badge that was 3 inches in diameter, and 14-inch signs that two employees taped to their backs), enfd. 395 F.2d 557 (10th Cir. 1968), cert. denied, 393 U.S. 840 (1968).

In addition, Walmart restricts union insignia not only when associates are on the sales floor and thus in a position to interact with customers, but also when associates are working in nonpublic areas of the store or when the store is closed to the public altogether. (See FOF, Section II(B)). When associates are on duty but not in contact with customers, Walmart's concerns about the customer experience are moot, and Walmart's concerns about the associate being identifiable to coworkers and loss prevention personnel are addressed by the fact that the associate would still be wearing the customary khaki pants, blue shirt and Walmart nametag (as well as a Walmart vest, after September 2014). Further, while Walmart pointed out that all associates may interact with customers during their shifts when their job duties require them to go on the sales floor, Walmart did not show that it would be impractical for those associates to simply remove or cover their union insignia while interacting with the public. See FOF, Section II(B), fn.7, supra (discussing the testimony that Walmart presented about the feasibility of donning and doffing union insignia); see also *Target Corp.*, 359 NLRB No. 103, slip op. at 22 (2013) (rejecting the employer's argument that its ban on all buttons was justified to preserve its public image and business plan, and noting that the ban was overly broad because it applied to overnight employees who worked when the store was closed to the public); *W San Diego*, 348 NLRB at 374 (finding that the hotel did not demonstrate that its prohibition on wearing union insignia was justified by special circumstances in nonpublic areas of the hotel where employees would not be seen by the public and thus the hotel's public image was not at issue, and noting that a mere hypothetical impracticality with removing union insignia did not justify the hotel's prohibition on union insignia).

In light of these shortcomings in Walmart's proffered special circumstances, I find that Walmart's concerns about logos are outweighed by the associates' Section 7 right to wear union insignia in the workplace. I therefore find that Walmart violated Section 8(a)(1) by maintaining its February 2013, May 2014 and September 2014 dress code language requiring logos to be

[11] The Board has observed in the past that certain union insignia do not interfere with a company's public image because the union insignia are small, neat and inconspicuous. See *Nordstrom, Inc.*, 264 NLRB at 701 (noting that the union pin at issue was "muted in tone, discrete in size and free from provocative slogans or mottos"); see also *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). It does not follow, however, that union insignia **must** be small, neat or inconspicuous to be protected, particularly where (as here) the employer has not justified such size restrictions with special circumstances.

"small" and "non-distracting." The offending dress code language regarding logos is overly broad, is not justified by special circumstances, and places unlawful restrictions on associates' Section 7 right to wear union insignia.[12]

CONCLUSIONS OF LAW

1. By, since about February 2013, maintaining February 2013, May 2014 and September 2014 dress codes that unlawfully limit associates' right to wear union insignia, Walmart violated Section 8(a)(1) of the Act.

2. By committing the unfair labor practice stated in conclusion of law 1 above, Walmart has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I will also require Respondent to rescind its unlawful February 2013, May 2014 and September 2014 dress codes. Respondent may comply with this aspect of my order by rescinding the unlawful dress code provision and republishing an associate dress code at its affected stores (i.e., all stores in the United States)[13] without the unlawful provision. Since republishing the dress code for all affected stores could be costly, Respondent may supply the associates at its stores either with an insert to the dress code stating that the unlawful provision has been rescinded, or with a new and lawfully worded provision on adhesive backing that will cover the unlawfully broad provision, until Respondent republishes the dress code either without the unlawful provision or with a lawfully-worded provision in its stead. Any copies of the dress codes that are printed with the unlawful February 2013, May 2014 and/or September 2014 language must include the insert before being distributed to associates at Respondent's affected stores. *Boch Honda*, 362 NLRB No. 83, slip op. at 4; *Guardsmark, LLC*, 344 NLRB 809, 811–812 & fn. 8 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

In addition to the standard remedies that I described above, the General Counsel requested that I also order Respondent to have a representative read a copy of the notice to

[12] The General Counsel and Charging Party also argued that Walmart's February 2013, May 2014 and September 2014 dress codes are facially unlawful work rules that reasonably tend to chill associates' exercise of their Section 7 rights. See GC Posttrial Br. at 7–8; CP Posttrial Br. at 6; see also *Lutheran Heritage Village-Livonia*, 343 NLRB at 646–647 (describing the legal standard that applies when challenges to work rules are at issue). Since I have found that Walmart's February 2013, May 2014 and September 2014 dress codes are facially unlawful because they improperly restrict associates' Section 7 right to wear union insignia, I decline to address the parties' arguments concerning the Board's "work rule" legal standard.

[13] At least one version of the dress code was applicable in every state and the District of Columbia. (See Jt. Exhs. 1–11 (listing, on the first page of each policy, the jurisdictions that had "state-specific" dress codes when the dress code was issued).

associates in each of its affected stores during work time. The Board has required that a notice be read aloud to employees where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 21.

Applying that standard, I do not find that Respondent's misconduct in this case was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to employees by one of Respondent's representatives at each of its affected stores. Although I have found that Respondent committed one unfair labor practice that affects all stores in the United States, the unfair labor practice is somewhat technical in nature, and this case does not involve widespread misconduct (beyond the singular violation here) at the affected stores. Accordingly, I find that a standard notice posting remedy will be sufficient to address the dress code violation at issue here and ensure that associates are advised of their Section 7 rights.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

Respondent, Walmart Stores, Inc., Bentonville, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining its February 2013, May 2014 and September 2014 dress code provisions for associates that are overly broad and unlawfully restrict associates' right to wear union insignia.

(b) In any like or related manner interfering with, restraining, or coercing associates in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, to the extent applicable in each state and the District of Columbia, the overly broad provisions in its February 2013, May 2014 and September 2014 associate dress codes that unduly restrict associates' right to wear union insignia.

(b) Furnish all current associates in its stores in the United States with an insert for its applicable associate dress code that (1) advises that the unlawful provision regarding logos and union insignia has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or (in the alternative) publish and distribute to

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

associates at its stores in the United States revised copies of its associate dress code that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

(c) Within 14 days after service by the Region, post at all stores in the United States copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed one or more of the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current associates and former associates employed by Respondent at the closed facilities at any time since February 7, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. June 4, 2015

_____
Geoffrey Carter
Administrative Law Judge

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain our February 2013, May 2014 and September 2014 dress code provisions for associates that are overly broad and unlawfully restrict associates' right to wear union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce associates in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind, to the extent applicable in each state and the District of Columbia, the overly broad provisions in our February 2013, May 2014, and September 2014 associate dress codes that unduly restrict associates' right to wear union insignia.

WE WILL furnish all current associates in our stores with an insert for our applicable associate dress code that (1) advises that the unlawful provision regarding logos and union insignia has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or (in the alternative) WE WILL publish and distribute to associates at our stores revised copies of our associate dress code that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

WALMART STORES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-5208
(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-114222 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.